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No. 89-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO REFINING AND MARKETING INC., and
TEXACO MARINE SERVICES INC.,

Petitioners,

—v.—

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
NINTH DISTRICT COURT OF APPEALS
OF THE STATE OF TEXAS
AT BEAUMONT, TEXAS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Texaco Refining and Marketing Inc. and Texaco Marine Services Inc. ("Petitioners"). Petitioners have given consent to the MLA to file an *amicus* brief, but Respondents have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2.

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives MLA, during the ninety-one years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. 1-15.

MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-nine national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

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3 *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 M.M. COHEN, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The general maritime law must be applied in any case involving injuries or damages resulting from traditional maritime activity. Since negligence in the performance of a traditional maritime activity—the navigation of a loaded commercial tanker—was alleged and found to have proximately caused the injury, the Texas court's application of state law to this action constitutes a grave threat to uniformity of U.S. maritime law and invites

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

forum shopping and unpredictability in an area in which consistency is essential. Moreover, a failure to correct the Texas court's holding that state courts are free to "follow their own notions about this field of law" would produce a chaos of conflicting and erratic decisions and would amount to an endorsement of fortuity in direct contravention of one of the central tenets of maritime law and of the goals of MLA.

Uncertainty about the measure of damages available for a maritime personal injury will make it much more difficult for maritime attorneys to assess the risks faced by their clients and will discourage settlement, thus adversely affecting the practices of MLA's membership and the wide variety of interests represented. Given the lack of a *forum non conveniens* doctrine in the state courts in question, *see Alfaro v. Dow Chemical*, 786 S.W.2d 674 (1990), there is likely to be a proliferation of disparate results in maritime personal injury cases if the state court's declaration that it is free to ignore federal maritime precedent is permitted to stand. Accordingly, we urge that this motion be granted.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. MLA can comment objectively about the need for review by this Court in order to ensure national uniformity on the issues presented.

MLA was an active participant in the drafting and adoption of the Death on the High Seas Act.[9] MLA also appeared as *amicus* in *Tallentire*, in which this Court held that state law remedies were unavailable to supplement those provided by the Death on the High Seas Act. 477 U.S. at 233. While the Petitioners have addressed several errors on the part of

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9 46 U.S.C. §§ 761-768. *See also* 46 U.S.C. App. §§ 761-767.

the Texas state court, MLA will concentrate only on the need for uniformity in maritime actions regardless of the forum, and on the dangers of permitting the state decision to stand.

Dated: June 8, 1990

Respectfully submitted,

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Texaco Refining and Marketing Inc. and Texaco Marine Services Inc. ("Petitioners").

QUESTIONS OF LAW PRESENTED

1. Whether a state court must apply the general maritime law in an action arising from the negligent operation of a commercial vessel on navigable waters within a state?

2. Whether a court may supplement a recovery in a maritime case by including an element of damages available under state law but unrecoverable under the maritime law?

INTEREST OF *AMICUS CURIAE*

This is stated in the Motion which precedes this Brief.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Because the accident resulted from the negligent navigation or operation of a vessel upon navigable waters, the suit falls within the admiralty and maritime jurisdiction and is governed by the general maritime law as applied in the federal courts, whether or not the plaintiff was a seaman and wherever the effects of the negligence were produced. The general maritime law must be applied uniformly to maritime cases regardless of the forum in which the case is tried. Thus, the Texas state court was not at liberty to apply the state law of recoverable damages nor to develop its own notions of maritime law on this subject since there is specific and unambiguous federal maritime case law rejecting the element of damages—mental anguish of the decedent's family—sought here.

REASONS FOR GRANTING THE WRIT

1. SINCE THE TORT AROSE FROM TRADITIONAL MARITIME ACTIVITY, THE STATE COURT DEFIED SUPREME COURT PRECEDENT WHEN IT REFUSED TO APPLY THE GENERAL MARITIME LAW.

The Texas court of appeals correctly recited the holding of *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), that there must be "some substantial relationship between the tort and traditional maritime activities . . . ." Petition App. A at 14a. The court also correctly held that traditional maritime activities include "navigation or commerce on navigable waters," *id.*, precisely the activities that were alleged and found to have proximately caused the damages at issue. *Id.* at 3a-9a. The court's own holdings thus confirm the nature of this case as within the heart of the admiralty jurisdiction, whether or not the decedent was a seaman or other maritime worker, *see Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), and even if the effects of the maritime tort took place on land. 46 U.S.C. § 740.

2. THE UNIFORMITY DOCTRINE ENDORSED BY THIS COURT IN *MORAGNE* REQUIRES APPLICATION OF THE GENERAL MARITIME LAW TO CASES INVOLVING INJURIES OCCURRING IN STATE TERRITORIAL WATERS.

While state courts are competent to hear most matters falling within the admiralty jurisdiction, they are bound in such cases to apply the general maritime law as interpreted by the federal courts. *See, e.g., Romero v. International Terminal Co.*, 358 U.S. 354, 367 n.23 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385-87 (1924); *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 157-61, 164 (1920); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). Thus, it was error for the state court to apply the state law of

damages, even though the tort occurred in state territorial waters.

In the seminal case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court held that the general maritime law provided an action for "death caused by a violation of maritime duties" in state territorial waters. *Id.* at 409. *See id.* at 393, 397-98, 401-03. That is precisely the circumstance at issue here. The *Moragne* court left no doubt about the need for uniform application of the general maritime law in cases involving death resulting from a breach of maritime duties and rejected the chaotic patchwork that would result from engrafting state law remedies:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *The Lottawanna*, 21 Wall. 558, 575 (1875).

Id. at 402-03 (citations omitted).

In overruling *The Harrisburg*, 119 U.S. 199 (1886), on which *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), was based, *see* 398 U.S. at 409, 377-78, the *Moragne* Court thought it had put to rest any arguments based on *The Tungus*, commenting that "the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus*, which followed upon it, and the problems of federal-state accommodation they occasioned" would be obviated by *Moragne's* "recognition of a remedy for wrongful death under general maritime law [which] can be expected to bring more placid waters." *Id.* at 408. The state court here should not be permitted to recreate the turbulence which the *Moragne* court sought to calm once and for all.

3. THE STATE COURT WAS REQUIRED TO APPLY THE GENERAL MARITIME LAW AS INTERPRETED BY THE FEDERAL COURTS.

In a maritime action, a court may look to state law only in the absence of a federal statute or precedent. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). State courts are not free to supplement with state law the remedies granted by the maritime law for breach of a maritime duty. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986); *Chelentis*, 247 U.S. at 382-84.

Since a matter of maritime law was at issue, the state court was obligated to follow the rulings of the federal circuit courts which have expressly held that *Moragne* provides a uniform remedy for breach of a maritime duty. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Matter of S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971). As a matter of general maritime law, the state court was also restricted to awarding only those elements of damages available under the general maritime law, particularly because there was a conflict in this instance between the state law and the general maritime law about whether damages for the survivors' mental anguish can be recovered. *Compare* Petition App. C at 27a *with Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-86 & n.17 (1974). *Gaudet* expressly states that damages for survivors' mental anguish may *not* be recovered under the general maritime law. *Id. See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978).

The Texas court's shocking assertion that the state courts are free to "follow their own notions about this field of law," Petition App. A at 16a-17a, defies the history of the uniformity doctrine in this Court. *See, e.g., The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875).

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: June 8, 1990.

Respectfully submitted,

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I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On June 8, 1990, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Petition for a Writ of Certiorari in re: "Texaco Refining and Marketing Inc. and Texaco Marine Services Inc., v. The Estate of Dau Van Tran, Vi Thi Pham and Do Van Tran" in the United States Supreme Court, October Term 1988, No. 89-1754, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 8, 1990 at New York, New York.

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